Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1523

IN THE

Supreme Court of the United States

October Term, 1980

FAIRDALE FARMS, INC., *Petitioner,*

vs.

YANKEE MILK, INC., and REGIONAL COOPERATIVE MARKETING AGENCY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER

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Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

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This Brief is submitted in reply to the Brief for the United States as *Amicus Curiae* which was filed in response to the Court's invitation to the Solicitor General to express the views of the United States. This reply brief is necessitated by a serious misunderstanding of the facts of this case on which the Solicitor General bases his view of the pertinent law.*

* While Plaintiff Fairdale Farms, Inc. obviously disagrees with much of the Solicitor General's interpretation of the applicable case law, it believes that the original Petition adequately addresses the relevant cases.

This case is indisputably *not* a case where a dairy cooperative acquired and maintained power *through the voluntary enrollment of all producers in its marketing area.* (Brief of U.S., pp. 1, 8, 14). Even Defendants have never maintained this position. Defendant Yankee Milk, Inc. ("Yankee") gained its market power (within the statute of limitations period) through merger of the three largest New England dairy cooperatives, the eventual acquisition of a fourth dairy cooperative, and an affiliation agreement with another large cooperative operating in New York and New Jersey whereby Yankee controlled this coop's New England producers. Defendant Regional Cooperative Marketing Agency, Inc. ("RCMA") gained its market power through a combination of cooperatives, federations of cooperatives, and a common marketing agency. In response to Defendants' Motions for Summary Judgment, Plaintiff Fairdale Farms, Inc. ("Fairdale") produced evidence that both the merger which formed Yankee and the formation of RCMA were done with the deliberate purpose of gaining market power sufficient to impact New England milk prices and to eliminate competition. Thus, the case involves much more than the "voluntary enrollment" of farmers.

The formation of Yankee Milk was first discussed by two of Yankee's predecessor coops, who then commissioned a study by the Springfield Bank for Cooperatives to examine the advantages of the two coops combining. It was "the unequivocal conclusion of this study . . . that a complete combination of [the two coops] at the earliest possible time will be in the best interest of the producer members. This conclusion is based largely upon the substantial magnitude of the economic advantages and improvement in bargaining power to be gained by combining the two enterprises." The study further stated, "With the merger of [the two coops], two of the principal competitors in the market will be eliminated."

The predecessor coops then drew up a STATEMENT OF POLICY, which Yankee has indicated sets forth the purposes of its formation. The STATEMENT's list of goals include:

> (a) The operation of the new organization to enhance blend prices to the greatest degree possible.

and

> (d) Working in all legitimate ways with similar organizations to gain further bargaining strength for dairy farmers.

Similarly, the formation of RCMA was for the purpose of raising prices. RCMA described its formation in answers to interrogatories:

> In early 1973 the Federal Order prices were lagging substantially behind the spiralling costs facing dairy farmers. Dairy farmers were going out of business and a possible shortage of milk and dairy products was looming on the horizon. Members of the New York-New England Dairy Cooperative Coordinating Committee began discussing possible alternatives. *It was determined that an organization needed to be formed that would provide the framework within which the cooperatives could work to establish realistic price levels for milk.* [Emphasis added.]

Both Yankee and RCMA have made extensive efforts to recruit new members. In addition, Yankee has adopted a marketing program designed to strengthen its market dominance. Its first provision is:

> 1. All members will be signed to a uniform and strong membership agreement with the cooperative, giving the cooperative the right to market the milk of its members.

Under Yankee's membership contract, Yankee, rather than acting as an agent to sell its members' milk to handlers, purchases its members' milk. The contract con-

tains strong penalties if the member sells his milk elsewhere, the member agrees to pay all costs and fees in an action Yankee brings to enforce the agreement, the member agrees that Yankee is entitled to an injunction to prevent the breach of the contract, and also agrees to an automatic yearly renewal unless terminated by notice 45 days prior to the anniversary date. Yankee has brought several lawsuits against farmers to enforce its contracts. The obvious value to Yankee of having such a strong membership contract is that it solidifies the control over the milk that is so essential to bargaining strength.

Another aspect of the program is:

> 2. All amounts due from handlers for milk received by them from members will be collected by the cooperative, and all payments to individual members will be made on checks written and issued by the cooperative.

The Springfield Bank study had recommended:

> One of the most effective ways of repeatedly demonstrating that the cooperative is performing worthwhile services for members is to mail to members their checks. The receiving of Combined Cooperative milk checks by members would visibly demonstrate that it is the cooperative which is purchasing and selling members' milk and this, coupled with other member services, *would greatly strengthen the ties between the cooperative and members and would weaken the ties between handlers and members.* [Emphasis added.]

The control over hauling, often done by handlers or independent haulers, is another way of strengthening member ties to the coop, rather than to such haulers or handlers. Thus, another phase of Yankee's marketing program is:

> 4. The pick-up and trucking of members' milk from farm to first market destination will be controlled by the cooperative. To accomplish this the cooperative could, if desirable, own the trucks used for hauling. In areas where equipment is not owned, the cooperative would exercise control over independent haulers in order to provide greater efficiency in a total marketing program.

Yankee also included in its marketing program a provision that:

> 6. The cooperative will attempt to develop a capacity of supplying the full needs of as many handlers as possible.

The strategic advantage of supplying the full needs of handlers is obvious, as it leaves the handler at the mercy of its supplier for fear of a sudden cut-off.

Another very significant aspect of Yankee's operation is "balancing" or handling of surplus milk. Yankee is also a milk handler engaged in the processing of milk into dairy products. Its marketing program contains provisions as follows:

> 5. The cooperative will exert control over reserve supplies of milk through the use of its plant facilities or otherwise.
>
> . . .
>
> 7. The cooperative will provide adequate facilities for the efficient utilization of milk and milk products ~~not needed in the market place,~~ either seasonably or day-to-day, and will set up a marketing program designed to market these products at the greatest value to all the members.

Yankee uses its plant facilities to process surplus milk into manufactured products which have a longer storage life, and therefore can avert a price decrease because of excess fluid milk on the market. Yankee has repeatedly

claimed credit for "successfully balancing for all producers in the New England market", but notes that this is contingent on Yankee having upwards of 70% of the producers for the given markets. Yankee has also acknowledged that this balancing function has enabled RCMA to charge its over order premiums.

RCMA pricing activity was discussed in the original Petition, but deserves some additional comment in reference to the Section 2 claim. RCMA member cooperatives were, of course, able to collect substantial premiums (up to $1.45 above a price of $10.32 per hundredweight of fluid milk), and maintain them even at a time when the market would have brought about a price decrease. Yankee has admitted that its market dominance was necessary to enable it to collect the premium, the best evidence of this being that RCMA was unable to collect the premium in the larger New York-New Jersey market or on Class II (nonfluid) milk products which compete on a regional and national basis.

In addition to the above factors, Fairdale objected in its Complaint to a "pull order" issued by Yankee when Fairdale balked at paying the RCMA premium. Yankee instructed its Fairdale producers not to let Fairdale pick up their milk the next day. Although this order was subsequently rescinded when Fairdale learned of it and protested, it brought to Fairdale's attention in no uncertain terms Yankee's intention to use its market position to enforce the RCMA price. As Fairdale's expert testified in deposition, in the milk business where the supply is perishable and has to come in regularly, a handler must be assured of an ongoing supply to remain a viable, healthy concern and meet its supply commitments. Even Yankee's expert, a former Federal Milk Market Administrator, admitted that a shut-off of supply with one day's notice was unheard of in the industry.

Thus, this case arises in a factual posture of a systematic program to enhance and solidify market dominance, enhancement of prices because of market dominance, and conduct aimed at using the market dominance to enforce the prices. And, it should be noted that this all took place within a time period of two and a half years from the formation of Yankee (RCMA was formed one year later) to the break-off of relations between Yankee and Fairdale.

In conclusion, the Solicitor General's reliance on an assumption that Fairdale only challenges voluntary enrollment of members under Section 2 is erroneous. The above facts were presented to both the District Court and the Second Circuit Court of Appeals and have formed the factual framework in which both Courts reached their decisions.

Respectfully submitted,

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JULY 8, 1971

Certificate of Service

We, Fred I. Parker, Esq. and Susan F. Eaton, Esq., members of the law firm of Langrock Sperry Parker and Stahl, P.O. Drawer 351, Middlebury, Vermont 05753, and Keith I. Clearwaters, Esq., of the law firm of Chapman & Clearwaters, 1700 K Street, N.W., Washington, D.C. 20006, attorneys for the Petitioner in the above entitled cause, and members of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of July, 1981, we served copies of the foregoing Reply Brief of Petitioner on Yankee Milk, Inc., the Regional Cooperative Marketing Agency, the Solicitor General of the United States, and the Council of Farmer Cooperatives, by mailing three copies thereof, in duly addressed envelopes with first class postage pre-paid, to the attorneys of record for said Respondents, Thomas D. Clifford, Esq., Shipman & Goodwin, 799 Main Street, Hartford, Connecticut 06103; David P. O'Hara, Esq., Bond, Schoeneck & King, One Lincoln Center, Syracuse, New York 13202; Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530; and Donald E. Graham, Esq., National Council of Farmer Cooperatives, 1800 Massachusetts Ave., N.W., Washington, D.C. 20036.

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